No. 12,376

IN THE

United States Court of Appeals

For the Ninth Circuit

CITY AND COUNTY OF HONOLULU,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

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JURISDICTION.

This is a condemnation proceeding instituted by the United States on January 8, 1946 (R. 2-8) in the District Court of the United States for the Territory of Hawaii pursuant to the authority of "divers and Sundry Acts of Congress, among them the following:

The Act of Congress approved March 27, 1942 (Public Law 507—77th Congress) as amended by

The Act of Congress approved December 20, 1944 (Public Law 509—78th Congress)

The Act of Congress approved June 26, 1943 (Public Law 92—78th Congress)

The Act of Congress approved June 22, 1944 (Public Law 347—78th Congress)

and that the Secretary of Navy, acting under authority vested in him by law has determined that it is necessary that the United States of America acquire by condemnation, by judicial process, certain lands being all streets, roads, and highways (except Lehua Avenue) and lie within the perimeter of the description * * *." (R. 2 and 3). This appeal is taken from that portion of the final Judgment entered July 20, 1949 wherein it was determined that the Territory of Hawaii and the City and County of Honolulu should be paid One Dollar ($1.00) for the taking of the roads, streets and highways in the Pearl City Peninsula. (R. 64-66.) Notice of Appeal and Bond for Costs on Appeal was filed September 14, 1949. (R. 69-71.) The jurisdiction of this Court in invoked by authority of Sections 1291 and 1294 (1) of the Judicial Code approved June 25, 1948. (28 U.S.C.A. Sec. 1291; 28 U.S.C.A. Sec. 1294 (1).)

STATEMENT OF THE CASE.

This is a condemnation proceeding instituted by the United States pursuant to the authority of several acts of Congress to condemn for the use of the Navy Department the fee simple title in and to all roads, streets and highways (except Lehua Avenue) lying below the Oahu Railway's right-of-way and within the Pearl City peninsula for the purpose of effecting the Pearl Harbor Security Strip Perimeter Acquisition. (R. 4-III.)

The Territory of Hawaii and the City and County of Honolulu were, among others, made Parties Defendant because they had or claimed some right, title or interest in and to said streets. Both the Territory of Hawaii and the City and County of Honolulu filed appearances in the condemnation proceedings (R. 8, 9 and 39); the City and County filed a Demand for Jury Trial (R. 42) and further answered that it was the owner of certain improvements and pavement along said streets as well as the owner of two concrete bridges. (R. 40.) A Declaration of Taking (R. 45-47) and Order and Judgment on Declaration of Taking was entered and filed in said proceedings March 31, 1947. (R. 58 and 59.) All interest save those of the Territory of Hawaii and the City and County of Honolulu had been disposed of by the District Court.

On March 24, 1948, a stipulation was entered into and filed in these proceedings whereby it was agreed, by and between the Territory and the City and County on the one hand and the United States on the other, that the City and County was deemed not only the owner of the beneficial interest in the streets, but also the owner of the fee and the Territory waived in favor of the City and County any right it had to compensation. (R. 60-62.)

On July 11, 1949, the case was called for trial on the claims of the City and County of Honolulu and the Territory of Hawaii. (R. 62.) The Deputy City and County Attorney stated that it was his understanding the hearing was for the purpose of having

the Court determine in point of law whether the interest of the City and County was nominal or substantial, and if the Court determined it to be substantial, the City and County would be given an opportunity to show the extent and degree. (R. 93.) The Court then ruled "* * * in the event that I find that the City and County has an interest, I will continue it for trial." (R. 94.)

Then followed argument by respective counsel and testimony of Francis H. Kanahele, Executive Officer of the Commissioner of Public Lands office that: 1) the Territory of Hawaii had fee title to all (R. 97-47-57) but a small percentage (1 or 2%) of the subject streets (R. 112), 2) the fee title was subject to an easement in the Public for road purposes, (R. 97-112), 3) the easement for road purposes or a portion thereof could be terminated by the Board of Supervisors adopting a resolution of abandonment, (R. 98 and 110), 4) the Commissioner of Public Lands could, in the name of the Territory, deliver a free and unencumbered title to that portion of the streets so abandoned, (R. 110 and 111), and 5) there were numerous instances where the Commissioner of Public Lands had, in the name of the Territory, conveyed out for substantial consideration either by way of exchange of land or receipt of money, lands which formerly had been encumbered by easement in the Public for road purposes and which had been disencumbered by adoption of a resolution of the Board of Supervisors of the City and County of Honolulu; (R. 111) no offer of proof was made by the City and

County to show that either the Territory of Hawaii or the City and County of Honolulu was required to build at its cost and expense any substitute streets or highways to replace those taken; (R. 114) it was conceded otherwise.

The hearing concluded with the Court determining in point of law that the interest of the Territory of Hawaii and the City and County of Honolulu was only a nominal one and "Accordingly, that being the rule, I will award the Territory the nominal value of One Dollar ($1.00) for this public way which has been taken for the fee underlaying that public way, and that being the ruling of the Court in point of law there is no need of continuing the matter for the introduction of specific evidence on the point what Mr. Kanahele said he could furnish for the illustrations of it." (R. 113 and 114.) Exceptions to the Court's ruling were noted by the defendant, City and County of Honolulu. (R. 114.)

Thereafter, on July 20, 1949, an Order was entered in said proceeding entitled Order Fixing Just Compensation which order fixed the sum of One Dollar ($1.00) to be paid the Territory of Hawaii or the City and County of Honolulu for the Taking of subject streets which order was entered subject to exception to Court's ruling reserved by the City and County of Honolulu. (R. 64-66.)

QUESTIONS PRESENTED.

Whether the Court erred in point of law, that the City and County should be paid only $1.00 for the taking of the Streets in Pearl City peninsula?

Whether the City and County was entitled to have the damages awarded by a jury?

STATEMENT OF POINTS ON APPEAL.

Now comes the City and County of Honolulu, Appellant in the above entitled case, and specifies the following statement of points to be relied upon on appeal:

1. The Court erred in determining the fair value and just compensation to be the sum of only One Dollar ($1.00) which should be paid by Petitioner, United States of America, to the Territory of Hawaii and the City and County of Honolulu for the taking of the fee title to the streets and highways as described in the Petition for Condemnation and Declaration of Taking herein.

2. The Court erred in not allowing the value of said property to be awarded by a jury.

SUMMARY OF ARGUMENT.

1. Municipalities are entitled to the protection of the Fifth Amendment in the taking of their property by the United States.

II. The rule that "the true measure of compensation when a municipality's streets are condemned is the cost of providing any necessary substitutes" *United States v. City of New York,* 2 Cir., 1948, 168 F.2d 387 at page 389, does not and should not apply when the municipality owns the fee which can be used for other than highway purposes.

III. The City and County could have delivered merchantable title to a substantial portion of the land taken by the United States, or could have appropriated it to other public purposes.

IV. The City and County is, under the Fifth Amendment, entitled to substantial compensation for that land to which it could have delivered merchantable title or could have appropriated it to other public purposes.

V. The City and County, having demanded a jury trial (R. 42), and not having waived said demand, is entitled, under the Seventh Amendment to compensation awarded by a jury.

ARGUMENT.

I.

MUNICIPALITIES ARE ENTITLED TO THE PROTECTION OF THE FIFTH AMENDMENT IN THE TAKING OF THEIR PROPERTY BY THE UNITED STATES.

A. It is established that state or municipal property devoted to the public use is "private property"

within the jurisdiction of the Fifth Amendment which requires "just compensation" for its condemnation by the United States. *St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92 (1893); *United States v. Wheeler Township*, 66 F. 2d 977 (C.C.A. 8th-1933); *Town of Bedford v. United States*, 23 F. 2d 453 (C.C.A. 1st-1927); *Town of Nahant v. United States*, 136 F. 273 (C.C.A. 1st-1905). In the light of the Constitution then, the taking from a municipality is the same as the taking from an individual. The disability, if any, is not upon the owner, but upon the value of the thing taken.

29 *Corpus Juris Secundum*, page 955, Eminent Domain, Section 130 reads as follows:

> "* * * The Federal Government cannot take nor authorize a taking of property which is held by the state for its own corporate and public use, such as highways and city streets, without providing for compensation."

See also 18 American Jurisprudence, page 805, Eminent Domain, Section 171, which reads as follows:

> "Sec. 171. When taken by exercise of Federal Sovereignty. It is not within the competency of the Federal Government, without suitable compensation, to dispossess a state, county, town or city of its control and use of its public property, and appropriate the same to the government's own benefit, or the benefit of any of its corporations or grantees. The Federal Government's power of eminent domain is to be used subject to the broad limitations of the Fifth Amendment. It is a stranger to the state agency. It can no

> more take, without compensation, a town's property rights than it can those of an individual."

Such municipal property coming then as it does within the protection of the United States Constitution, it is axiomatic that that protection cannot be abridged by either the Legislature, or the Judiciary. Admittedly, any rule which provides for the payment of no compensation or nominal compensation, is in derogation of that protection afforded by the Fifth Amendment of the Constitution.

II.

THE RULE THAT "THE TRUE MEASURE OF COMPENSATION WHEN A MUNICIPALITY'S STREETS ARE CONDEMNED IS THE COST OF PROVIDING ANY NECESSARY SUBSTITUTES" (UNITED STATES v. CITY OF NEW YORK, 2 CIR., 1948, 168 F. 2d 387, AT PAGE 389) DOES NOT AND SHOULD NOT APPLY WHEN THE MUNICIPALITY OWNS THE FEE WHICH CAN BE USED FOR OTHER THAN HIGHWAY PURPOSES.

Let us examine the rule and inquire as to how it came into existence. In the *Alderson* case, *United States v. Alderson, et al.,* 53 F. Supp. 528, S.D. West Va., in January of 1944, the Court at page 529 stated

> "There are few reported decisions upon the measure of damages for the taking of public highways. There are now pending throughout the United States a large number of proceedings to condemn highways traversing lands acquired by the Federal Government for military purposes, making the subject one of increasing public interest."

Thus it may be seen that as of January 1944, there existed no firm expression from the United States Congress or the Judiciary as to the proper measure of value when the United States condemns a public highway.

The rule first referred to, came into expression by Circuit Judge Sanborn in April 24, 1945, when he wrote the decision for the *Des Moines* case, *United States v. Des Moines,* 148 F.2d 448 (C.C.A. 8). Judge Sanborn stated at page 449:

> "The question for decision is whether the United States, in condemning for military purposes, public roads within the area of the Iowa Ordnance Plant, in Des Moines County, Iowa, is obliged to pay the appellees as just compensation (1) the value of the roads taken, or (2) the cost of providing necessary substitute roads, or (3) nominal damages.
>
> The District Court, after the trial of the issue of just compensation or damages in this proceeding to condemn the roads, found as a fact: 'That the full, fair, reasonable and actual value of the roads and highways * * * on the 1st day of March 1941 [the date of taking], was the sum of One Hundred Seventy-five Thousand ($175,000) Dollars, which I find and award as just compensation for the taking of said roads and highways, with the bridges, culverts and improvements thereon.' This award with interest resulted in a judgment for $208,687.50 against the United States. It has appealed.
>
> [1] The amount allowed the appellees by the District Court as just compensation for the tak-

ing of the roads in suit is not shown by the evidence to have any relation to any financial loss or out-of-pocket expense caused or which will be caused, by the taking. The amount apparently reflects the replacement value of reproduction cost of the roads taken, with interest added. *If it is unnecessary to replace the roads or to provide substitutes for them, the appellees have suffered no money loss and have been relieved of the burden of maintaining the roads taken. If it is necessary for the appellees to provide substitute roads in order to readjust their system of highways, they are entitled to the cost of constructing the necessary substitute roads, whether that be more or less than the value of the roads taken. This cost will give to the appellees the actual money loss which will be occasioned by the condemnation, and is the proper measure of damages for the taking.* United States v. Wheeler Township, 8 Cir., 66 F.2d 977, 984, 985; Jefferson County, Tenn. v. Tennessee Valley Authority, 6 Cir., 146 F.2d 564, 566, certiorari denied April 9, 1945, 323 U.S. ....., 65 S.Ct. 1016; Mayor and City Council of Baltimore v. United States 1945, 4 Cir., 147 F.2d 786. In fairness to the trial judge, it should be said that the two cases last cited were decided after the entry of the judgment appealed from." (Italics our own.)

Judge Sanborn based his rule that the cost of necessary substitute roads was the *exclusive* measure of compensation upon the authority of the *Wheeler Township* case, the *Jefferson County* case and the *Baltimore* cases, *supra* pages 10-11. Judge Sanborn did not discuss either the *Bedford* case, *supra* page

8, or the earlier *Nahant* case, *supra* page 8. Since the *Nahant* case was copiously quoted from in the *Bedford* case we shall discuss only the latter— which incidentally, is the subject of an annotation in 56 A.L.R. 365 at pages 374 and 375, the excerpt therefrom is entitled b, "When taken by Federal Government acting under its own sovereign power." Quoting from the opinion of the *Bedford* case the Court stated at page 453:

> "* * * the United States took, as of November 10, 1926, by eminent domain, for Veterans' Hospital, a tract of land in the town of Bedford containing about 400 acres. The taking covered 'all rights of every name, nature, and description in and to that portion of Springs road so called, as shown' on a plan referred to. Springs road was an old road, used from time immemorial, and maintained at the expense of the town. The taking cuts out a half mile of the road, but the severance will render other portions unavailable and require new roads to connect the termini. The facts concerning the extent of the damage need not now be stated; for it is stipulated that, if the town is entitled to recover, the amount shall be $10,000.
>
> The Court below ruled against the town, without opinion. The single question here is whether the taking by the United States, by eminent domain, of a way located in the town, entitles the town to compensation."

And again at page 454:

> "While it is settled that in Massachusetts, ordinarily, towns do not own the fee in town ways

(Inhabitants of Millbury v. Blackstone Canal Co., 8 Pick. 473) and that the easement is not technically vested in the town, but belongs to the general public (Inhabitants of Andover v. Sutton, 12 Metc. 182, 188), it is also settled that the town has a qualified property or interest in its highways (McHugh v. City of Boston, 173 Mass. 408, 53 N.E. 905)."

And again at same page:

"* * * For present purposes, a town may be regarded as a group of taxpayers, charged, inter alia, with the burden of building and maintaining such highways as common convenience and necessity require. Any act that increases those burdens takes additional money from the group of taxpayers. A highway once built exonerates, pro tanto, that group; taken or otherwise destroyed, a new burden is imposed. To take the furnished means of meeting a liability imposed by law has the same effect as taking property technically vested; loss accrues. Bedford's rights in Springs road was as real a property right as a leasehold of the same land, or as an abutting owner's right of access to the street. And cases cited.

And continuing on page 456:

"* * * These views were reaffirmed by this court in the same case (153 F. 520), where Judge Aldrich said:

'Just compensation' is the compensation vouchsafed to private interests by the Federal Constitution. This phase of the case is not upon arbitrary lines. The government in a situation like this in effect says the right to take is neces-

sarily arbitrary and must stand unchallenged; but having thus, under the strong arm of sovereignty, cut through private and municipal rights, the rigor of the arm shall be relaxed, and the government itself will see that just compensation is awarded accordingly. The paramount law intends that the owner shall be put in as good condition pecuniarily by a just compensation as he would have been if the property had not been taken. Lewis on Eminent Domain, Sec. 464. In our view it is almost, if not quite, an element of the government's case to see to it that just compensation is ascertained and accorded. The question of just compensation contemplated by the Constitution is more an equitable question than a strictly legal or technical one. The policy of the government is to absorb all interest, so that it shall remain undisturbed in the exercise of its dominion over the property, and to this end its purpose is to render constitutional compensation under legal principles, softened somewhat by broad considerations of justice.

Careful consideration of these two opinions makes it clear that many of the difficulties, logical and under the authorities, that the Court there met, grew out of the failure of the town of Nahant to claim full compensation—not merely for its structures in the streets, but for its right in the land constituting the streets. The logic of these two decisions covers all rights and interests that towns have in highways, and, as already noted, the right to exoneration from the burden of constructing and maintaining a substitute way is a valuable property right belonging to the group of taxpayers called a town.

It should not be overlooked that, when our highway law took form, 'ways' were hardly more than strips of land, slightly, if at all, improved. To-day, as a result of the automobile, a large part of our highways are structures of stone and cement, costing more per mile than the original cost of many of our railroads. We can see neither logic nor justice in attempting to distinguish between such structures in the street as sewers, water pipes, and buttresses of bridges, and the structure constituting the way itself, and the right of the town to the use of the land, apart from any expenditure previously made thereon, by the town. The real question is one of the incidences of cost or expenditure; and there is no such thing as compensation, within the fair meaning of the word, unless the separate entity that under sovereign power appropriates a part of this town way is required to pay the expenses it thus imposes upon the town within whose territory it makes the taking."

And finally at page 457:

"* * * Any increased tax burden resulting from such shifting of the public use of lands lying in any town is within the scope of the Legislature's general control over the allocation of tax burdens. 119 Mass. 360. But the federal government's power of eminent domain—necessarily implied as an efficient and appropriate means of exercising other powers expressly given—is to be used subject to the broad limitations of the Fifth Amendment. It is a stranger to the town. It can no more take, without compensation, their property rights, than it can those of an individual.

> The result is that, pursuant to the stiplation, the decree of condemnation is to be amended by awarding $10,000 to the town of Bedford, with interest thereon from November 10, 1926."

The rationale of the *Bedford* case, as we see it, is that when the United States takes property OR imposes additional burdens it must pay commensurate compensation.

In the *Wheeler Township,* supra, page 11, case, the first of the three (3) cases relied on by Judge Sanborn that the cost of necessary substitute roads was the exclusive measure of compensation, the United States and Canada entered into a treaty to regulate the level of the Lake of the Woods and thereby submerge and render useless existing highways. On the question of whether the taking of the highways came within the protection of the Fifth Amendment, the Court stated at page 982:

> "* * * But if this language might be applicable we think it cannot control here for the reasons following. All condemnations by the United States are primarily controlled by the Fifth Amendment. While the amendment reads that '*private* property cannot be taken for public use, without just compensation' (italics added), yet 'private,' as thus used, includes property which is ordinarily regarded as public property—such as that held for public uses by a state;" and cases cited.
>
> "All of these cases concern streets or highways. That easements such as these highways are 'property' is not open to dispute. They are

interests in land—incorporeal hereditaments;" and cases cited. "Therefore, these highways cannot be taken and their use as such destroyed without compensation under the Fifth Amendment."

And again at page 984 as to the unique character of the case:

"* * * The situation here is peculiar. To these exceptional facts we must apply such established general principles as are applicable in order to determine the proper measure of damage — or, more accurately stated, of compensation."

And finally at page 984 as to the measure of compensation:

"* * * When we come to the method of ascertaining the amount of compensation—the measure of damages or compensation—we encounter the peculiarities of this situation. We have a safe starting point in the above fundamental legal proposition that the township must be made whole from money loss. When the ordinary measure of loss (decrease in actual or assumed 'market value') cannot be applied, as here, then 'whatever is necessary to be considered in order to determine what is an equivalent for the appropriation of private property is germane to the question of compensation.' Winona & St. Peter R. Co. v. Denman, 10 Minn. 267 (Gil. 208), and see Monongahela Nav. Co. v. U.S., 148 U.S. 312, 328, 13 S.Ct. 622, 37 L. Ed. 463. Here we must be guided by this record as to what money loss will fall upon the township because of this condemnation. It is the duty of the township to

maintain its roads and that duty can be enforced. (See above citations from Minnesota statutes.) The expense therefor comes from the taxpayers of the townships, for whom the township is (in a sufficient sense) trustee and representative. The right of the township and its taxpayers is to maintain such roads with the lake at natural levels and 'the right to exoneration from the burden of constructing and maintaining a substitute way is a valuable property right belonging to the group of taxpayers called a town.' Town of Bedford v. United States (C.C.A.), 23 F. (2d) 453, 456, 56 A.L.R. 360. To the extent that this burden has been increased by this taking there is a deprivation for which the law requires compensation. Is this extent to be measured by the present inadequate road standard or by some other? To take the present standard seems unfair and insufficient. The proper standard is not that of the present inadequate roads on the one hand nor a high grade of highway on the other. It is that type of road which it is the legally compellable duty of the township to maintain. If the present standard be taken and tomorrow the township be compelled to build a better type of road there would, unquestionably, be an added expense in building such road caused solely by this condemnation burden. Why should not this added expense be made good by the one causing it? It cannot be done except in this proceeding. The existing status is not controlling. Keefe v. Annpaul Realty Co., 215 App. Div. 301, 213 N.Y.S. 637, 642, 643; Haight v. Littlefield, 147 N.Y. 338, 343, 41 N.E. 696. On the other hand, a high type of road is too uncer-

tain and speculative of realization to be any guide, although there would, necessarily, be this added expense from the flowage to such road if ever built. But there is no injustice to appellant in being required to make good to the township taxpayers the added expense for that character of construction and maintenance of these established roads which can, at any time, be compelled, under existing state law, by five freeholders of the township or of an adjoining township in the same county. Mason's Minn. Stat. 1927, Sec. 2607. This standard, under that law, is a 'reasonably passable' road. Section 2607. The claim of the township and the measure adopted by the trial court was that of a reasonably passable road at the places affected by this flowage easement. In fact, the evidence for appellee is that the type taken as reasonably passable is 'the lowest type of road that they could build to allow any two way traffic to pass and it is the only thing that would stand up under most any traffic conditions'; that no 'lower standard or of a cheaper construction * * * would stand up under the conditions that the roads are subjected to with the water elevated as provided for in the Treaty'; that it is 'the cheapest and most economical type of highway that can be constructed which would stand up and furnish reasonable highway service for Wheeler Township where the waters are left and maintained as provided for in the Treaty'; that 'a less adequate plan would only be of temporary service.' This evidence came from witnesses who, for the most part, were familiar with the soil and water conditions and were highly

qualified by training, experience, and occupation to testify concerning roads, their construction and maintenance. The township did not claim the entire cost of building this type of road but only the difference in expense between a passable road under natural lake levels and one under the flowage levels provided for in this condemnation. We think the measure of compensation was correctly submitted."

As we evaluate the *Wheeler Township* case, there is no basis either in the factual situation presented to the Court or the Court's opinion to warrant the conclusion that the cost of necessary substitute roads is, in all such cases, the *exclusive* measure of damages.

The second case cited by Judge Sanborn in the *Des Moines, supra,* pages 10-11, opinion was the *Jefferson County v. Tennessee Valley Authorities, supra,* page 11. In this case, the impounding of the waters by the Tennessee Valley Authorities so changed the landscape and so altered the physical geography as to obliterate 95 miles of improved public highways. Part of the factual situation presented to the Court, however, was that the T.V.A. "answered that at its own cost, it had constructed a new highway system for the appellant adequate to meet its transportation needs."

And quoting again from the opinion at page 565, (F.R. 146-2d),

> "The question presented is whether the obligation of the United States under the Constitution to pay just compensation when it dispossesses

a state, county, city or town of the control and use of highways and appropriates the lands on which such roads are located to the government's benefit or the benefit of any of its corporations or grantees is satisfied when adequate substitute road facilities are provided at the cost of the United States."

The concluding paragraph of the decision reads:

"* * * As we view it, *under the facts in the record,* all that appellant was entitled to as damages for the taking of the land on which its highways were built, was the entire cost of restoring to its citizens an adequate highway system after the construction of the dam. Since the record shows that appellee at its own expense, has completely restored the highway facilities of the county destroyed on account of the construction of the dam, appellant is entitled to take nothing by these proceedings. Judgment affirmed." (Italics our own.)

It may be noted that here also the condemnee had only an easement in the highway.

The final authority relied on by Judge Sanborn was the *Balitimore* case, *supra,* page 11. In the *Baltimore* case, the United States condemned certain alleyways, the title to which under Maryland law, was in the abutting owners subject, however, to an easement in the public for road purposes. The Court stated, in part, at pages 788 and 789:

"* * * In other words, the interest of the abutting owner is not a contingent interest but a present subsisting ownership of the fee, subject

> only to the easement in favor of the public; and if, for any reason, the easement is abandoned, the entire beneficial interest in the land reverts to him."

It is important to note that the Court here considered three (3) aspects of our present question: (1) who owns the encumbered fee, (2) a fee subject to an easement in the public for road purposes may be disencumbered by the municipality and (3) a fee subject to such an easement is not contingent, but a "present subsisting ownership" or estate and this is so even where the power or capacity to disencumber vested in a third person /the city/.

Under the facts of the *Baltimore* case, the City had only an easement or the control of an easement. There was no showing to the Court (1) that it expended any money in the development of the alleyways (2) that the easement or the control of the easement had any market value, (3) that there was any duty to build substitute alleyways.

The Court in the *Baltimore* case had occasion to discuss the *Boston Chamber of Commerce* case, the pertinent excerpt reads as follows at page 789:

> "* * * In a number of cases effect has been given to these views. In Boston Chamber of Commerce v. Boston 217 U.S. 189, 30 S. Ct. 459, 54 L. Ed. 725, the City condemned for street purposes a parcel of land owned by the Chamber of Commerce over which for years a wharf and dock corporation had had an easement of way, light and air. The two owners united in demanding $60,000 for their interests, which was con-

ceded to be the value of the land as an unrestricted fee; but the Court held that the parties had suffered little damage by the change of the existing easement for the benefit of the Wharf Company into an easement for the general public, and limited recovery to the sum of $5,000 to which the parties had agreed as an alternative figure. The Court said at page 195 of 217 U.S., at page 460 of 30 S.Ct., 54 L. Ed. 725: "* * * the Constitution does not require a disregard of the mode of ownership,—of the state of the title. It does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole. It merely requires that an owner of property taken should be paid for what is taken from him. It deals with persons, not with tracts of land. And the question is, What has the owner lost? not, What has the taker gained? We regard it as entirely plain that the petitioners were not entitled, as matter of law, to have the damages estimated as if the land was the sole property of one owner, and therefore are not entitled to $60,000 under their agreement."

We feel that the result of the *Boston Chamber of Commerce* case is sound for the reason that the parcel had previously been appropriated to a special use and as Mr. Justice Holmes pointed out, disencumbrance of the fee could be accomplished only by a substantial diminution of value of the property of the Central Dock and Wharfage Corporation. A buyer of the encumbered fee could only reasonably expect to clear his title by the payment of a substan-

tial sum of money for the relinquishment of the easement.

Quoting from Mr. Justice Holmes' opinion, 54 Law. Ed. at page 727:

> "* * * The petitioners contended that they had a right, as a matter of law, under the Constitution, after the taking was complete and all rights were fixed, to obtain the connivance or concurrence of the dominant owner, and by means of that to enlarge a recovery that otherwise would be limited to a relatively small sum. It might be perfectly clear that the dominant owner never would have released short of a purchase of the dominant estate,—in other words, that the servitude must have been maintained in the interest of lands not before the Court,—but still according to the contention, by a simple joinder of parties after the taking, the city could be made to pay for a loss of theoretical creation, suffered by no one in fact."

In Massachusetts, the taking for highway purposes did not include the fee, but imposed upon it an easement of public travel. Since the fee was already subject to an easement for light and air, the imposition of the additional easement for public way did not substantially diminish the existing value of the fee. Neither was the dominant estate injured by the superimposition of the public way easement onto its easement for light and air.

The *Maryland* case also discusses in *Re Public Beach, Borough of Queens, City of New York,* 269 N.Y. 64, 199 N.E. 5, some language from which is

quoted in the *California* case, *infra,* page 31. The principal point of the *Public Beach* case being that the city in condemning land for public beach takes land free from easements therein, but must compensate each owner of dominant tenement for the value of easement extinguished, which value is ordinarily represented by difference between value of dominant tenement before and after taking, and city must also compensate owner of fee for value of fee burdened by servitudes or easements.

The Court here stated (199 N.E. 5, at page 6):

> "* * * In such case the ownership of the incumbered fee/beach land subject to an easement running to a large group for beach purposes and uses/ has no substantial value. It cannot be used for any purpose which will bring to the owner either profit or enjoyment. It is a burden rather than a benefit, and its taking relieves the owner of the burden".

It is manifest that such language is predicated upon two assumptions: (1) that such easement destroyed all economic utility of the fee, and (2) that such easement was perpetual.

This bring us to what we consider to be a crucial distinction between the taking from private owners and the taking from a state, county or municipality. It is beyond the power or capacity of a private owner who subjects his fee to an easement in the public for road purposes to disencumber that fee. Consequently, when such land is condemned from the private owner he is awarded only nominal damages upon the basic

assumption that the easement running as it does for perpetuity, in the absence of any proof to the contrary, destroys the economic utility of the land and the land thereby has only a nominal value. Should, however, that fee, encumbered as it is with an easement in the public for road purposes, be acquired by a state, county or municipality having the power and capacity to abandon or change the public purpose or the use, then, in the face of such power and capacity to disencumber, the easement is tantamount to a revocable license.

Turning again to *Des Moines* case, *supra,* pages 10-11, it would appear that the three (3) cases therein cited are questionable authority for the proposition.

> "If it is unnecessary to replace the roads or to provide substitutes for them, the Appellees have suffered no money loss and have been relieved of the burden of maintaining the roads taken. If it is necessary for appellees to provide substitute roads in order to readjust their systems of highways they are entitled to the cost of constructing the necessary substitute roads, whether that be market or less than the value of the roads taken."

It may be pointed out that in the three (3) cases cited, the condemnees had only an easement and in the *Des Moines* case itself, the town had only an easement.

With reference to the Court's statement in the *Des Moines* case that the taking by the United States caused "no money loss" and "relieved" /the county/

"of the burden of maintaining the roads taken" it is desired to point out that a completed street, as stated in the *Bedford* case, represents a substantial expenditure on the part of the builder and that such expenditures are not made by accident, but upon the calculated expectation of obtaining a substantial yield in taxes from the property that is served by such street. Thus, where the Federal Government has as in this case, first condemned the property served by the instant streets, (R. 73), thus destroying the *"raison d'être,"* then condemns the streets themselves including the fee and offers to pay therefor the sum of One Dollar upon the premise that the cost of necessary substitute streets is the *exclusive* measure of damages and further justifying such taking upon the additional premise that no money loss has been suffered and also that it relieves the condemnee of the burden of maintaining the streets taken, is of no more logic than to condemn everything in the town, but the business district and then refuse to pay more than a Dollar therefor for the reason that since it served no purpose, there was need to relocate it and the owners were relieved of the burden of paying future taxes thereon.

Since constitutionalwise, ownership by a municipality is equivalent to ownership by an individual, are we right in basing our thinking on such criteria? What of the 101 non-productive activities in the community, parks, playgrounds, libraries, golf courses, schools, et al.? They all are a decided burden to main-

tain. In fact, every ramification of government, excepting only the Tax Collector's Office is a burden to maintain. Can we assert that (1) such money as has been poured into the venture is already lost and the taking by the United States causes no money loss, or (2) relief of this burden to maintain is justification for payment of only nominal damages? Such narrow reasoning would lead to the inescapable conclusion that the Public Works Department of a municipality is a decided liability because it spends indefinite thousands of dollars and never takes in a penny whereas, the Tax Collector's Office is entitled to a different measure of value because its expenditures are nominal and its income tremendous.

In a review of the three (3) cases cited as authority for the Des Moines ruling, the cost of substitute roads as a proper measure of compensation appears to be peculiarly well adapted to the fact situations of both the *Wheeler Township* and the *Jefferson County* cases. In both cases substitute roads were necessary and the Court held, in substance, that where the old roads were submerged, the United States discharged its Constitutional liability by providing new roads—a *quid pro quo* equitable result. But does it follow as a logical corollary, that in the event it is unnecessary to construct substitute roads, no constitutional liability is imposed? As for the *Baltimore* case, there was no need to apply the measure of compensation by cost of substitute facilities rule nor was there any showing by the City that it came within the ordinary rule of market value.

In view of the constitutional protection, however, and the fact that that protection cannot be impinged on by the Congress, or the Judiciary, is it not conclusive that the market value test, when available, should be applied to property owned by a municipality and that the formulation of any rule that would destroy the market value of the property sought to be condemned would be violative of the fundamental constitutional guarantees.

In short, the Judiciary may formulate a rule which would have as its effect an enhancement of the market value rule for the purpose of producing an equitable result, but it may not formulate a rule that would destroy the market value as just compensation. This principle is given effect in the *New York* case, *infra,* page 30, wherein the United States government in acquiring additional land for the Brooklyn Navy Yard, acquired three (3) streets and the Washington Avenue Bridge; the Court there allowed the payment award of $5,303.00 for the Washington Avenue Bridge being the salvage value thereof. See also case note in Columbia Law Review, Vol. 48—1948, pages 1096-1098.

The next reported case *Woodville, Oklahoma v.* U.S. 1946, C.C.A. 10, 152 F.2d 735, uses the following language at page 737:

> "It is *well settled* that the compensation to which the City is entitled when its streets are condemned is the cost of providing necessary substitutes therefor." (Italics our own.)

citing the *Jefferson County* and the *Des Moines* cases.

In the next reported case *United States v. Los Angeles,* 1947, C.C.A. 9, 163 F.2d 124, the United States took a portion of Anaheim road for a navy defense plant. The county of Los Angeles had an easement for road purposes and was awarded the sum of $16,282.00 being the market value of such easement. Quoting from the pertinent portion of the decision at page 125:

> "the $16,282.00 awarded to the county was awarded as being the market value of the county's easement. That easement had, and could have had, no market value. Instead of awarding the *supposed* market value thereof to the county, the Court should have ascertained, and should have awarded to the county, the cost of providing a substitute road to replace that part of the Anaheim road * * *." (Italics our own.)

The next reported case on the question is the *Arkansas* case, *United States v. Arkansas,* 1947, C.C.A. 8, 164 F.2d 943, wherein the United States took land and bridge for Norfolk River Dam and Reservoir. The state was awarded $1,342,000.00 cost of the substitute roads plus $80,000 for the cost of a ferry. In its opinion the Court refers to the measure of damages as being (well settled) and the award of $80,000 for the ferry was held to have been proper.

The next case was *New York City* case, *United States v. New York City,* 1948, C.C.A. 2, 168 F.2d 387. The District Court case being reported in 71 F. Supp. 255. The opinion of the Court written by

Judge Clark stated that the "rule is quite definite * * *" also "reference to recent cases demonstrates the quite universal acceptance" /of it/.

The final decision of this line of cases is from the Ninth Circuit, September 1, 1948, *State of California v. United States,* 169 F.2d 914, at pages 924, 925 and 926, the United States condemned streets, the fee of which was owned by the State of California. *Said streets were, however, 20 feet under water.* The opinion of the Court reads in part as follows at page 924:

> "The doctrine applies with equal force whether the public entity owns the fee in the roadbed or merely holds title to an easement thereon as trustees for the benefit of the public. If as here, the governmental unit owns the fee simple, the existence of the easement reduces the value of the public street or road to a nominal sum."

In conclusion, we respectfully point out that Judge Sanborn's rule, if applied to cases where the City owns the fee, is obviously inapplicable where (1) the easement does not destroy the full economic utility of the fee or (2) where such easement or a substantial portion thereof may be terminated at will. Let us assume there are valuable mineral rights under the surface of the street. Would not the owner of the fee be entitled to adequate compensation therefor? Would not such mineral rights be subject to the "market value test"?

And further, assuming that such easement does destroy the entire economic value of the fee, does not

the fact that the easement itself can be terminated at will, restore the presumptive value in the fee and make the land thereby susceptible of being used for other public purposes?

As a final comment on the rule formulated by Judge Sanborn in the *Des Moines* case, it should be noted that the three year period covering its inception to it being "quite universally accepted," was a WAR/Post WAR period; an atmosphere surcharged with patriotic zeal, where no sacrifice was too great to make for the United States government in the prosecution of World War II and further, the specific line of cases had to do with the United States government in exercise of its war time powers.

III.

THE CITY AND COUNTY COULD HAVE DELIVERED MERCHANTABLE TITLE TO A SUBSTANTIAL PORTION OF THE LAND TAKEN BY THE UNITED STATES, OR COULD HAVE APPROPRIATED IT TO OTHER PUBLIC PURPOSES.

A. The ownership of the streets in the Pearl City peninsula was in the Territory of Hawaii. Section 6112, Revised Laws of Hawaii 1945, reads as follows:

> "Sec. 6112. Owned by Government. The ownership of all public highways and the land, real estate and property of the same shall be in the government in fee simple."

See *Marie K. Humphreys v. Manuel Mello, et al.* May 29, 1909, 19 Haw. 468; to the effect that it is owned by The Territory in fee simple.

B. The stipulation of March 24, 1948 by and between the United States of America, Petitioner, the Territory of Hawaii and the City and County of Honolulu, Defendants, merged, for the purposes of being entitled to compensation in this proceeding, the interest of the Territory of Hawaii and the City and County of Honolulu in and to such Pearl City peninsula streets. (R. 60-62.)

C. Such streets or portions thereof, may, under territorial law, be abandoned and disposed of for a substantial consideration. Section 4539, Revised Laws of Hawaii 1945, reads as follows:

> "Sec. 4539. Disposal of abandoned roads, etc. Whenever a public road, street, alley or walk, railroad or ditch right-of-way, or any portion thereof, shall at any time be vacated, closed, abandoned, or discontinued, the same shall be used for the purposes of the Territory; provided, that in case the same shall be in any way disposed of by the territory, it shall be first offered to the abutters for a reasonable length of time and at a reasonable price, and if they do not take the same, then it may be sold at public auction."

D. The City and County of Honolulu through its Board of Supervisors is vested with the power and capacity to abandon such Pearl City peninsula streets. See Section 6521, Subsection (33) Revised Laws of Hawaii 1945.

"Powers and Duties of Supervisors.

Sec. 6521. General Powers.

Subsection 33. Sale of real property. To sell at public auction after notice of publication once a week for at least two weeks in any daily newspaper of general circulation in the city and county, any real property acquired by the city and county whenever the Board deems it advisable to abandon the use of such property for the purpose for which it was acquired; * * *"

E. Let us consider this anomalous situation: If, immediately prior to the taking by the United States government, the Board of Supervisors of the City and County had abandoned the medial 40 foot strips of land of said streets, leaving 20 foot lanes on either side with crossovers at the intersections, and appropriated the abandoned portions to park purposes, the United States government, in its condemnation, would have to pay full market value for the park land thus taken. Are we to conclude then, that effective protection by the Fifth Amendment is conditioned upon the Board of Supervisors taking such action? The law does not require the performance of a needless act and there was no occasion—nor was it necessary—after the taking by the United States, for the Board of Supervisors to adopt such a resolution of abandonment. No more so than it is necessary for the owner of a fee, subject to a revocable license, to terminate that license prior to being entitled to full compensation upon condemnation of his property. Is it not reasonable to suppose that a volitional

act will be performed where it is to the person's substantial advantage to do so and to the person's substantial disadvantage to refrain from so doing?

The evidence was clear and uncontradicted that upon the Board of Supervisors adopting such a resolution of abandonment, the Territory of Hawaii could deliver merchantable title to the land so abandoned. (R. 110.)

IV.

THE CITY AND COUNTY IS, UNDER THE FIFTH AMENDMENT, ENTITLED TO SUBSTANTIAL COMPENSATION FOR THAT LAND TO WHICH IT COULD HAVE DELIVERED MERCHANTABLE TITLE OR COULD HAVE APPROPRIATED TO OTHER PUBLIC PURPOSES.

Since Argument I establishes the proposition that municipalities are entitled to the protection of the Fifth Amendment in the taking of their property by the United States, and Argument III establishes the fact that the United States took from the City and County a valuable economic asset, we believe the following excerpt from *Olson v. United States,* 292 U.S. 246, at pages 254 and 255 to be applicable:

> "* * * The judicial ascertainment of the amount that shall be paid to the owner of private property taken for public use through exertion of the sovereign power of eminent domain is always a matter of importance for, as said in Monongahela Nav. Co. v. United States, 148 U.S. 312, 324, 37 L. Ed. 463, 467, 13 S.Ct. 622: 'In any society the fullness and sufficiency of the securities which surround the individual in the use

and enjoyment of his property constitute one of the most certain tests of the character and value of the government.' The statement in that opinion (p. 326) that 'no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner' aptly expresses the scope of the constitutional safeguard against the uncompensated taking or use of private property for public purposes. Reagan v. Farmers' Loan & T. Co. 154 U.S. 362, 399, 38 L. Ed. 1014, 1024, 14 S.Ct. 1047, 4 Inters. Com. Rep. 560.

That equivalent is the market value of the property at the time of the taking contemporaneously paid in money. Seaboard Air Line R. Co. v. United States, 261 U.S. 299, 306, 67 L. Ed. 664, 669, 43 S.Ct. 354; Jacobs v. United States, 290 U.S. 13, 17, ante, 142, 54 S.Ct. 26; 2 Lewis, Em. Dom. 3d ed. Sec. 682, p. 1172. It may be more or less than the owner's investment. He may have acquired the property for less than its worth or he may have paid a speculative and exorbitant price. Its value may have changed substantially while held by him. The return yielded may have been greater or less than interest, taxes and other carrying charges. The public may not by any means confiscate the benefits or be required to bear the burden, of the owner's bargain. L. Vogelstein & Co. v. United States, 262 U.S. 337, 340, 67 L. ed. 1012, 1014, 43 S.Ct. 564. He is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more. It is the property and not the cost of it that is safeguarded by state and Fed-

eral constitutions. Minnesota Rate Cases (Simpson v. Shepard) 230 U.S. 352, 454, 57 L. ed. 1511, 1563, 33 S.Ct. 729, 48 L.R.A. (N.S.) 1151, Ann. Cas. 1916A, 18.

Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held."

In principle, but to an appreciably lesser degree, the taking of the Pearl City Peninsula by the United States conforms to the principle of the *Brown* case, *Brown v. U.S.* 1923, U.S. Supreme Court, 263 U.S. 77, at page 83; 68 Law. Ed. 171, at page 180. In this case, an act of Congress provided for the purchase or condemnation of a new town site to replace three quarters of the existing town site taken for the Snake River reservoir at American Falls, Idaho.

The opinion by Mr. Chief Justice Taft reads in part as follows:

"The usual and ordinary method of condemnation of the lots in the old town, and of the streets and alleys as town property, would be ill adapted

to the exigency. It would be hard to fix a proper value of homes in a town thus to be destroyed without prospect of their owners' finding homes similarly situate on streets in another part of the same town, or in another town near at hand. It would be difficult to place a proper estimate of the value of the streets and alleys to be destroyed and not be restored in kind. A town is a business center. It is a unit. If three quarters of it is to be destroyed by appropriating it to an exclusive use like a reservoir, all property owners, both those ousted and those in the remaining quarter, as well as the state, whose subordinate agency of government is the municipality, are injured. A method of compensation by substitution would seem to be the best means of making the parties whole."

It is desired to invite the Court's attention to the fact that the taking by the United States government deprives the public of the right to use said streets. Owned as they now are by the United States government and appropriated by the Navy Department for a Pearl Harbor Defense perimeter, the public would have no more right to use those streets than it would the streets in the Pearl Harbor Navy Yard, where one cannot gain access without a special pass. In fact, that was the very purpose of the taking—to exclude the Public from the waters of Pearl Harbor—to create a security perimeter by such exclusion.

The United States government has already condemned the lands served by the Pearl City peninsula network of streets. Eventually, the entire commu-

nity whose land was thus taken, will have to relocate in other parts of Honolulu. Such relocation will place an additional burden upon the City and County of Honolulu. This liability may be considered speculative or indefinite, it cannot be proved up with any approach to definiteness in a court of law, but nevertheless it does exist in reality. It is however, just as certain as death or taxes. And just as certain, the City and County of Honolulu will have to spend a substantial sum of money to meet it.

V.

THE CITY AND COUNTY, HAVING DEMANDED A JURY TRIAL (R. 42), AND NOT HAVING WAIVED SAID DEMAND, IS ENTITLED, UNDER THE SEVENTH AMENDMENT TO COMPENSATION AWARDED BY A JURY.

In *Beatty v. United States,* C.C.A. 4, 1913, 203 F. 620 at page 626, the Court stated:

> "The taking of property by condemnation under the power of eminent domain is compulsory. The party is deprived of his property against his will. It is in effect a lawful trespass committed by the sovereign, and lawful only on the condition that the damages inflicted by the trespass are paid to the injured party. The analogy to a suit at common law for trespass is close and complete, and it is for that reason presumably the Supreme Court of the United States, acting on the definition of a suit at common law previously indicated by it, has decided that a proceeding by the United States to condemn lands for public purposes is a suit at common

law. If so it be, then it would follow that the defendant, if he claims it, is entitled at some stage in the proceeding to have his damages assessed by a jury."

CONCLUSION.

It is submitted that the errors of the Court below were prejudicial to the constitutional rights of the Appellant and that this Court should so hold and remand the case for trial.

Dated, Honolulu, Hawaii,
February 1, 1950.

Respectfully submitted,
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